



DEPARTMENT OF VETERANS AFFAIRS
Washington DC 20420

June 20, 2019

In Reply Refer To: 001B
FOIA Request: 18-07084-F

Jasper Craven
MuckRock News
DEPT MR 52794
411A Highland Ave
Somerville, MA 02144-2516
52794-37588499@requests.muckrock.com; jclarkcraven@gmail.com

Dear Mr. Craven,

This is the Third Partial Initial Agency Decision (IAD) from the Office of the Secretary, U.S. Dept. Veterans Affairs (OSVA) to your Freedom of Information Act (FOIA) request dated April 24, 2018, and received in this FOIA office on April 27, 2018. You requested:
"All e-mail communications between White House adviser Jake Leinenkugel and VA officials including, but not limited to, Casin Spero, Darin Selnick, Curt Cashour, David Shulkin, Scott Blackburn, Thomas Bowman, Peter O'Rourke, Brooks Tucker and Jonathan Ulyot between Jan. 20, 2017 and present day. Keywords should include, but are not limited to, 'VA,' 'accountability,' 'choice,' 'congress,' 'CVA,' 'private.'"

June 4, 2018, Beginning of Reasonable Searches

OSVA initiated its search for responsive records on June 4, 2018. Therefore, records that OSVA may have created or gathered after the cut-off date, June 4, 2018, are not considered to be within the scope of your FOIA request. FOIA does not obligate agencies to create records, but only to process records that already exist as of the cut-off date. LaRoche v. SEC, 289 F. App'x 231, 231 (9th Cir. 2008) (explaining that agency was not required to create new documents to satisfy FOIA request); Poll v. U.S. Office of Special Counsel, No. 99-4021, 2000 WL 14422, at *5 n.2 (10th Cir. Jan. 10, 2000) (recognizing that FOIA does not require agency "to create documents or opinions in response to an individual's request for information" (quoting Huddins v. IRS, 620 F. Supp. 19, 21 (D.D.C. 1985))); Sorrells v. United States, No. 97-5586, 1998 WL 58080, at *1 (6th Cir. Feb. 6, 1998) (advising that agency is not required to compile document that "contain[s] a full, legible signature"); Krohn v. DOJ, 628 F.2d 195, 197-98 (D.C. Cir. 1980) (finding that agency "cannot be compelled to create the [intermediary records] necessary to produce" information sought); *Citizen's Guide on Using FOIA*, U.S. House Oversight & Gov't Reform Comm. §V.B, pp. 6 (Sept. 2012), <https://oversight.house.gov/wp-content/uploads/2012/09/Citizens-Guide-on-Using-FOIA.2012.pdf> ("Please be advised an agency is not obligated to create a new record to comply with a request").

Third Partial IAD from Clarification Request Due June 16, 2019

On May 17, 2019, we informed you that your FOIA request must "reasonably describe[] such records" requested. 5 U.S.C. § 552(a)(3)(A)(i). Our VA FOIA regulations specify, "[t]he requester must describe the records sought in enough detail to allow VA personnel to locate them with a reasonable amount of effort Wide-ranging requests that lack specificity, or contain descriptions of very general subject matters, with no description of specific records, may be considered 'not reasonably described' and thus not subject to further processing." 38 C.F.R. § 1.558(d)(1).

We informed you that using your key terms (VA, accountability, choice, congress, and private) yielded seven thousand nine hundred two (7,902) emails and their attachments totaling approximately thirty-two thousand (32,000) pages. We informed you that using most of your key terms (accountability, choice, congress, and private) yielded two thousand three hundred eighty-eight (2,388) emails and their attachments totaling approximately ten thousand (10,000) pages.

On May 17, 2019, we informed you that you have not reasonably described the records you are requesting. We respectfully requested that you clarify or narrow the records you are seeking. Such clarifying or narrowing information includes limiting the number of custodians or search terms.

Because we did not receive clarification information from you within thirty (30) days, we concluded that you are no longer interested in pursuing this FOIA request. 38 C.F.R. § 1.554(d)(4). The 30-business-day timeframe for completing your FOIA request stops until clarification issues are resolved. 38 C.F.R. § 1.554(d)(4).

May 17, 2019, Second Partial IAD & May 2, 2019, Reasonable Search

On May 2, 2019, the OSVA FOIA Officer searched through White House Senior Advisor Jake Leinenkugel's emails with the search terms "Concerned Veterans," "Concerned Vets," and "CV4A." This search yielded nineteen (19) emails and their attachments totaling one hundred eighteen (118) pages.

On May 17, 2019, OSVA released one hundred eighteen (118) pages redacted with FOIA Exemptions 5 and 6. 5 U.S.C. § 552(b)(5) exempts from required disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Under the attorney-client and work product privileges, the VA redacts portions of records, emails, and communications between VA employees and attorneys relating to federal lawsuits against the VA. The release of this information would impede the ability of VA employees and attorneys to speak openly and frankly about legal issues concerning lawsuits against the VA. The release of this information would also compromise the VA's legal positions for its lawsuits.

5 U.S.C. § 552(b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The government is entitled to redact confidential government information given "the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure." Federal Open Market Committee v. Merrill, 443 U.S. 340, 363 (1979). Redacted information includes VA electronic mail server code usernames. The release of this information would expose the VA, its employees, and its contractors to potential hacking and information technology security liabilities and risks. Releasing even a single VA username reveals the pattern to ascertain VA usernames that VA employees use to log into VA Systems of Records; releasing VA usernames exposes the VA, its employees, and its contractors to potential hacking and information technology security liabilities and risks.

5 U.S.C. § 552(b)(6) exempts from required disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." FOIA Exemption 6 permits VA to withhold a document or information within a document if disclosure of the information, either by itself or in conjunction with other information available to either the public or the FOIA requester, would result in an unwarranted invasion of

an individual's personal privacy without contributing significantly to the public's understanding of the activities of the federal government. Specifically, the information being withheld, as indicated on the enclosed documents, under FOIA Exemption 6, consists of names, identities, email addresses, phone numbers, cellular numbers, and facsimile numbers of: federal employees, White House employees, and private citizens. However, we release the names of VA Senior Executives. Federal employees, White House employees, and private citizens retain a significant privacy interest under certain circumstances, such as in instances where the release of their information could represent a threat to their well-being, harassment, or their ability to function within their sphere of employment. The federal employees, Congressional employees, and private citizens whose information is at issue have a substantial privacy interest in their personal information. In weighing the private versus the public interest, we find that there is no public interest in knowing the names, identities, email addresses, phone numbers, cellular numbers, and facsimile numbers of: federal employees, White House employees, and private citizens. The coverage of FOIA Exemption 6 is absolute unless the FOIA requester can demonstrate a countervailing public interest in the requested information by demonstrating that the FOIA requester is in a position to provide the requested information to members of the general public and that the information requested contributes significantly to the public's understanding of the activities of the Federal government. Additionally, the requester must demonstrate how the public's need to understand the information significantly outweighs the privacy interest of the person to whom the information pertains. Upon consideration of the records, I have not been able to identify a countervailing public interest of sufficient magnitude to outweigh the privacy interest of the individuals whose names are redacted. The protected information has been redacted and (b)(6) inserted. "Withholding a telephone number or e-mail address, alone, is not sufficient to protect that [privacy] interest; alternate means of contacting and harassing these employees would be readily discoverable on the Internet if this court ordered their names disclosed." Long v. Immigration & Customs Enf't, 2017 U.S. Dist. LEXIS 160719 (D.C. Cir. 2017).

Thus far, for this FOIA request, VA has released to you fifty-seven (57) emails and their attachments totaling two hundred twenty-five (225) pages.

July 3, 2018, Partial IAD & June 4, 2018, Reasonable Search

On June 4, 2018, the OSVA FOIA office searched through White House Senior Advisor Jake Leinenkugel's emails. The OSVA FOIA Office used the search terms "Concerned Veterans of America," "CVA," and "cv4a.org." This search yielded thirty-eight (38) responsive emails and their attachments totaling one hundred seven (107) pages, redacted with FOIA Exemptions 5 (deliberative process privilege) and 6.

Exemption 5 protects interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency. Moreover, this exemption permits an agency to withhold material reflecting the thoughts, opinions, and recommendations of federal officials and consultants reviewing an issue, as well as non-final or draft documents. Under the deliberative process privilege and FOIA Exemption 5, OSVA redacts internal government deliberations, thoughts, opinions, recommendations, and proposed solutions from federal employees and consultants reviewing VA programs in their professional capacities, as well as non-final or draft documents. The information contained in the responsive records is both predecisional and deliberative because it reflects preliminary opinions, proposed solutions, and recommendations, which do not reflect VA's final decision. Exposure of premature discussions before a final decision is made could create undue public confusion. The release of the redacted information would negatively impact the ability of federal employees and consultants to openly and frankly consider issues amongst themselves when deliberating,

discussing, reviewing, proposing changes to, and making recommendations on VA programs. The information reveals the thoughts, deliberations, and opinions that, if released, would have a chilling effect on the ability of federal officials and consultants to discuss, opine, recommend or be forthcoming about the agency's issues which require full and frank assessment. Here, the disclosure of the withheld information is likely to compromise the integrity of this deliberative or decision-making process. Moreover, the predecisional character of a document is not altered by the passage of time. Bruscino v. BOP, No. 94-1955, 1995 WL 444406 at *5 (D.D. C. May 15, 1995), aff'd in part, No. 95-5212, 1996 WL 393101 (D.C. Cir. June 24, 1996).

FOIA Mediation

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. Under the provisions of the FOIA Improvement Act of 2016, the following contact information is provided to assist FOIA requesters in resolving disputes:

VA Central Office FOIA Public Liaison:

Name: John Buck

Email Address: vacofoiaservice@va.gov

Office of Government Information Services (OGIS)

Email Address: ogis@nara.gov

Fax: 202-741-5769

Mailing address:

National Archives and Records Administration

8601 Adelphi Road

College Park, MD 20740-6001

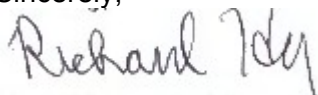
FOIA Appeal

This concludes OSVA's Third Partial Initial Agency Decision to request **18-07084-F**. Please be advised that should you desire to do so, you may appeal the determination made in this response to:

Office of General Counsel (024)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

If you should choose to file an appeal, please include a copy of this letter with your written appeal and clearly indicate the basis for your disagreement with the determination set forth in this response. Please be advised that in accordance with VA's implementing FOIA regulations at 38 C.F.R. § 1.559, your appeal must be postmarked no later than ninety (90) days of the date of this letter.

Sincerely,



Richard Ha, JD, CIPP/G
OSVA FOIA Officer